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In the principal case, the plaintiff attempted to establish a violation of her right to receive her son's body for burial by showing a failure by the defendant to notify her of his death. As the court points out, a failure to notify—a mere omission—is a very different act on the part of the defendant from an affirmative mutilation or withholding of the body. *Cf. Dextator v. Chicago etc. Ry. Co.* (1899) 120 Mich. 596, 79 N. W. 922. Only rarely does the law of torts hold a person liable for mere nonfeasance. See Bigelow, *Torts* (8th ed.) 111. For an interesting case holding a carrier liable for the affirmative act of burying a deceased passenger at sea, see *Finley v. Atlantic Trans. Co.* (1917, N. Y.) 115 N. E. 715, commented upon in 26 YALE LAW JOURNAL 790.

TRIALS—MISCONDUCT OF JURY—STATEMENT BY JUROR OF FACTS NOT IN EVIDENCE.—The defendant was convicted of manslaughter for the death of a child run over by his automobile. There was conflicting evidence as to whether the defendant was intoxicated at the time. During the jury's deliberations two of the jurors made statements to the others in regard to their own knowledge of the defendant's habits of intoxication. After a verdict of guilty the defendant moved for a new trial and presented a juror's affidavit that these statements had induced him to change his vote. *Held*, that the defendant was entitled to a new trial. *State v. Salmer* (1917, Ia.) 164 N. W. 620.

The majority of the states have followed the doctrine laid down by Lord Mansfield, that the affidavit of a juror in regard to the jury's misconduct will not be received. See *Vaise v. Delaval* (1785, K. B.) 1 T. R. 11. For recent cases on both sides, see *State v. Ausplund* (1917, Oreg.) 167 Pac. 1019, and *Barber v. Emery* (1917, Kan.) 167 Pac. 1044. The cases considering what misconduct, so proved, will be ground for new trial are therefore limited to a few jurisdictions, including Iowa, Kansas, Nebraska, Tennessee, Texas, and the federal courts. A statement of facts not offered in evidence, when made by a juror during the deliberations of the jury, is a plain violation of the theory of the "hearsay" rule. See 2 Wigmore, *Evid.* sec. 1362. Moreover, the accused has a right of cross-examination and quite generally by constitutional guaranty the right of confrontation. See *People v. Schallman* (1916) 273 Ill. 564, 113 N. E. 113; *Morris v. United States* (1907, C. C. A. 5th) 149 Fed. 123. There has been some difference of opinion whether the law will presume that the verdict was influenced by statements by a juror of facts not in evidence; but the bulk of authority is that the statement must be of such weight that it might reasonably be calculated to influence the verdict. *Douglas v. Agne* (1904) 125 Ia. 67, 99 N. W. 550. In the majority of the cases in which a new trial was ordered there was a conflict of evidence and it appeared affirmatively that the juror's improper statement influenced the verdict. *State v. Wegener* (1917, Ia.) 162 N. W. 1040, 1042; *Ham-bright v. State* (1905) 47 Tex. Cr. 518, 84 S. W. 597. There is found in a number of cases, a strong suggestion that a different rule might be applied in civil cases. See *State v. Wegener* (*supra*). It is true that criminal cases present a stronger case, since confrontation is then quite generally a matter of constitutional guaranty; but though in civil cases confrontation of witnesses by the party may be dispensed with, the right to cross-examination has been universally recognized as a basis for many of the rules of evidence. On principle, therefore, it would seem that no distinction should be made between civil and criminal cases in respect to misconduct which should be the ground for a new trial.

TRUSTS—CONSTRUCTIVE TRUSTS—ABSOLUTE DEVISE ON ORAL TRUST.—A husband by will left real estate to his wife. On the face of the will the devise was absolute, but at the time of the execution of the will the wife orally promised the husband that the property would be kept intact and on her death

divided equally between their two children. After the husband's death the wife conveyed all the property to one of the children. The other child brought an action in equity to establish a trust in her favor. *Held*, that she had no enforceable interest. *Brown v. Kausche* (1917, Wash.) 167 Pac. 1075.

See COMMENTS, p. 389.

TRUSTS—UNINCORPORATED ASSOCIATIONS—DISPOSITION OF PROPERTY ON DISSOLUTION.—Funds were held in trust for a constantly changing group of beneficiaries. These funds were contributed by the beneficiaries in accordance with certain rules, and were to be used to perform certain services for the contributors for the time being. The need for the service came to an end. *Held*, that the funds remaining should be divided among the contributors "ascertained at the date when the purpose of the fund came to an end, in proportion to their contributions." *In re Customs & Excise Officers' Fund* [1917] 2 Ch. 18.

The English law of trusts provides a flexible scheme by means of which voluntary unincorporated associations may obtain many of the advantages which incorporation would confer. See 3 Maitland, *Collected Papers*, 321. Trusts of this kind usually have a changing group of beneficiaries and are thus frequently confused with charitable trusts, from which they differ in the fact that there is always at any moment a group of definite beneficiaries. See *Old South Society v. Crocker* (1875) 119 Mass. 1, 23. When the affairs of an unincorporated association whose property is held in trust are to be wound up, it is not always clear just who is entitled to the property. The guiding principle is undoubted, and is well stated in the principal case: "the right . . . in these cases is founded on contract," *i. e.*, upon the agreement of the parties. The chief difficulty is to ascertain the fair meaning of that agreement. When that is done, apparently inconsistent decisions prove not to be so in fact. For example, in *Braithwaite v. Attorney-General* [1909] 1 Ch. 510—a decision which at first may be thought to be inconsistent with the principal case—the court found that, upon the true construction of the agreements involved, all the contributors to the fund had received all they had bargained for. That being so, the surplus remaining went to the Crown as *bona vacantia*. A similar result was reached on the same reasoning in *Cunnack v. Edwards* [1896] 2 Ch. 679. On the other hand, the court in another case held that on the true construction of the agreement the fund remaining on dissolution should be divided among those who were members of the association at the time of the passing of the resolution for dissolution. *In re Printers' etc. Society* [1899] 2 Ch. 184. *Cf. Coe v. Washington Mills* (1889) 149 Mass. 543, 21 N. E. 966. The decision in the principal case is reached by following the same guiding principle, ascertaining the fair meaning of the agreements of the various parties as found in the rules of the association.

WILLS—MISTAKE—EFFECT OF TESTATOR'S ERRONEOUS BELIEF OF SON'S DEATH.—In a will contest the only son of a testator offered evidence that the will was made under the mistaken belief that he was dead. *Held*, that the will was not open to attack on this ground. *Bowerman v. Burris* (1917, Tenn.) 197 S. W. 490.

Mistakes of a testator with respect to his will may be classified as intrinsic or extrinsic. Intrinsic mistakes relate to the nature or contents of the instrument. Extrinsic mistakes relate to collateral facts in consequence of which the terms of the will may have been drawn differently than they would have been if the testator had not entertained the mistake. Mistakes of the former class which concern the nature of the instrument render the whole will void for lack of *animus testandi*. *Swett v. Boardman* (1804) 1 Mass. 258; *In re Meyer's Estate* [1908] P. 353; *Nelson v. McDonald* (1891, N. Y.) 61 Hun. 406, 16 N. Y.